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No. 90-1201

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

H. PAUL LILLEBO, *et al.*,
Petitioners,

v.

GRAY DAVIS, in his capacity as
the Controller of the State of California, and
CALIFORNIA STATE EMPLOYEES' ASSOCIATION,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Third Appellate District

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MEMORANDUM IN OPPOSITION OF CALIFORNIA STATE EMPLOYEES ASSOCIATION

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STATEMENT

The State of California's Dills Act authorizes a union chosen by an appropriate collective bargaining unit of State employees as their exclusive representative to negotiate a labor contract providing "for organizational security in the form of . . . [a] fair share fee deduction" from the wages of represented employees. Pet. App. A-8-9, quoting Cal. Gov. Code § 3515.7(a). The California Act's purpose in this respect is to assure that all bargaining unit employees pay their share of "the costs incurred by the recognized employee organization in fulfilling its duty to represent the [unit] employees in their employment relations with the state, . . ." Pet. App. A-9, quoting Cal. Gov. Code § 3513(j).

The California Act provides that the fair share fee charged to an objecting nonmember of the union *may not* include "the employee's additional pro rata share of expenditures by the [union] that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment, or applied toward the cost of any other benefits available only to members of the [union]." Pet. App. A-9, quoting Cal. Gov. Code § 3515.8.

The California statute provides too that the fair share fee *may* include the objecting employee's pro rata share of "the costs of support of lobbying activities designed to foster policy goals [in] collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employers." Pet. App. A-9-10, quoting Cal. Gov. Code § 3515.8.[1] As authoritatively construed by the California court of appeal, the statutory permission to include lobbying expenditures in the fair share fee "is *limited to activities germane to collective negotiations, contract administration and employment benefits.*" Pet. App. A-11 (emphasis added).

The petitioners challenge this authorization to finance certain lobbying activities with fair share fees as *unconstitutional on its face.* Pet. App. A-10.[2] The courts below denied this challenge. As a matter of First Amendment law, the California court of appeal "conclude[d] that the union may properly use fair share fees for

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[1] This provision of the code refers to "policy goals and collective bargaining," but the California court of appeal determined that this was a typographical error and that the statute was intended to be read "policy goals *in* collective bargaining." Pet. App. A-32.

[2] The court below noted that questions concerning the constitutionality of the statute's application were not before it, because the petitioners dismissed the as-applied aspect of their case. Pet. App. A-35 n.11.

lobbying on matters germane to its collective bargaining role." Pet. App. A-40. And, as a matter of state law, the California court found that the California statute authorizes nothing more in terms of the use of fair share fees for lobbying. Pet. App. A-31-34.

The petitioners' constitutional theory is that the California Act violates the First Amendment by authorizing the use of fair share fees over objection for representational activities beyond collective bargaining in the narrowest sense of that term. Pet. 16. Petitioners would have it that the State's interest in labor peace is served only by face-to-face negotiations between the union representing State employees and the State's Executive branch in its role as employer. Pet. 17. From this premise, petitioners draw the conclusion that the only union lobbying that can be financed with an objector's fee payments is that necessary to ratify the collective bargaining agreement resulting from negotiations between the union and the Executive branch. Pet. 17.

The California court of appeal rejected this abstract approach to discerning the Legislature's interest in hearing from the exclusive representatives of State employees on employment matters. Rather, the California court placed the limited authorization for the expenditure of fair share fees on employment-related lobbying within the context of the State labor relations system. Pet. App. A-36-37.

To begin with, the California court of appeal notes that there is nothing in "the Dills Act [to] preclude [an] employer role for the Legislature." Pet. App. A-36. Far from there being a strict dichotomy between the Executive and Legislative branches when it comes to setting terms of State employment, the California court found that "in the context of public employment negotiations, the employer/state often assumes a duality in its executive and legislative roles." *Id.* Consistent with the dual roles played by the Executive and Legislature in State

labor relations, the California Act protects not only the right to meet and confer with representatives of the State Executive but "the union's broader right to represent its members in employment relations with the *state* (see §§ 3512, 3515.5), including not only the executive branch but also the Legislature." Pet. App. A-37, quoting *Cumero v. Public Employment Relations Bd.*, 49 Cal. 3d 575, 597, 778 P.2d 174 (1989) (emphasis in original).

Against this background, the California court of appeal stated that it "cannot fathom how a union's lobbying the Legislature for improvement of the conditions of employment of the members of its bargaining unit—union and nonunion alike—could not be considered to be part of its role as representative. . . ." Pet. App. A-37.

ARGUMENT

1. The California court of appeal's conclusion that an adequate State interest supports the decision of the California Legislature to authorize the use of fair share fees for *lobbying that is directly related to employment matters*, faithfully follows this Court's precedents setting the limits on compulsory fee payments. Pet. App. A-17-31. Moreover, the petitioners are unable to cite a single lower court decision that conflicts with the ruling below on lobbying expenditures. *See* Pet. 20-23.

The court of appeal paid particular attention to this Court's most recent decision in point: *Keller v. State Bar of California*, —— U.S. ——, 110 S.Ct. 2228 (1990). Applying the teachings of that decision to the circumstances of California State labor relations, the court found that "*Keller* . . . cannot be read to suggest, as plaintiffs would have it, that lobbying reasonably related to the advancement of the union's representational role may not be charged to objecting nonmembers. . . ." Pet. App. A-39.

In *Keller*, this Court held that all attorneys may be required to provide financial support to "those State Bar

activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession. . . ." 110 S.Ct. at 2237. In particular, the Court indicated that an objector's bar dues may be used to finance the making of "recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to . . . the *legislature*." *Id.* at 2235 (emphasis added). Thus, under *Keller* members of the legal profession may be required to pay their share of the lobbying costs incurred by the State Bar in advising the State on regulation of the profession.

The California court of appeal found that *Keller*'s rationale justified charging nonmembers for their share of the costs incurred by their exclusive representative in advising the State on the interests of State employees with respect to their terms and conditions of employment. In this regard, the court could not see "why a nonunion unit member benefitting from that representation should not be expected to contribute toward the cost of achieving it. This squarely implicates the essential state interest in eliminating the 'free rider' problem (in order to facilitate labor peace) which justifies what might otherwise infringe upon the nonmember's constitutional rights." Pet. App. A-38 (footnote omitted).

2. The petitioners attempt to tie this case to *Lehnert v. Ferris Faculty Ass'n*, Sup. Ct. No. 89-1217, which is currently pending before the Court. Pet. 20-22. That attempt fails.

Lehnert does *not* involve a *facial* challenge to a statutory authorization to use fair share fees for employment-related lobbying. Rather, *Lehnert* is concerned with *particular* lobbying expenditures found by a trial court to be authorized under a state statute. *See Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388, 1390 (6th Cir. 1989) ("this appeal is limited to the claim that the district court erred in holding that the costs of certain dis-

puted union activities were constitutionally chargeable to the plaintiff faculty members").

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).[3] The difficulty petitioners face here is especially great since, as the California court of appeal explained, in applying the lobbying authorization, the California courts will "adopt an interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality." Pet. App. A-34. *See also id.* at A-35 n.11.

Petitioners attempt to make the required showing by maintaining that the California Act authorizes the use of fair share fees for lobbying beyond that necessary to secure ratification of a collective bargaining agreement, and that the First Amendment prohibits the use of fair share fees beyond this very narrow range. Pet. 16-18. The petitioners are correct that the California statute does allow *employment-related* lobbying beyond that necessary to ratify the results of face-to-face negotiations between a union and the State Executive. But, as the California court of appeal recognized, *Keller* makes clear that the First Amendment does *not* confine the use of fair share fees only to lobbying that is directly related to collective bargaining narrowly defined. Rather, where, as here, the division of responsibility within government places certain issues concerning one's livelihood within the Legislative domain, *Keller* allows the use of fair share

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[3] The statutory authorization to use fair share fees for employment-related lobbying is *not* subject to First Amendment overbreadth analysis. The authorization does not *prohibit* any conduct, much less "make unlawful a substantial amount of constitutionally protected conduct. . . ." *Houston v. Hill*, 482 U.S. 451, 459 (1987).

fees for communicating with the Legislature on those issues. *See* pp. 3-4, *supra*.[4]

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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[4] The *Keller* Court found "useful guidelines for determining permissible expenditures" in the Railway Labor Act test for determining whether objecting fee payers may be charged for a particular class of activity. 110 S.Ct. at 2236. As set out in *Ellis* v. *Railway Clerks*, 466 U.S. 435 (1984), the RLA test is whether the activity "*relat*[*es*] *to the work of the union in the realm of collective bargaining*." *Id.* at 456 (emphasis added). This statutory test—which is "well within the acceptable range" under the First Amendment—allows "the union . . . a certain flexibility in its use of compelled funds," *id.* at 456-457, that permits charging for activities related to effective representation. As the California court of appeal opinion demonstrates, Pet. App. A-35-39, certain employment-related lobbying is a necessary part of effective representation in that State's public sector labor relations system.